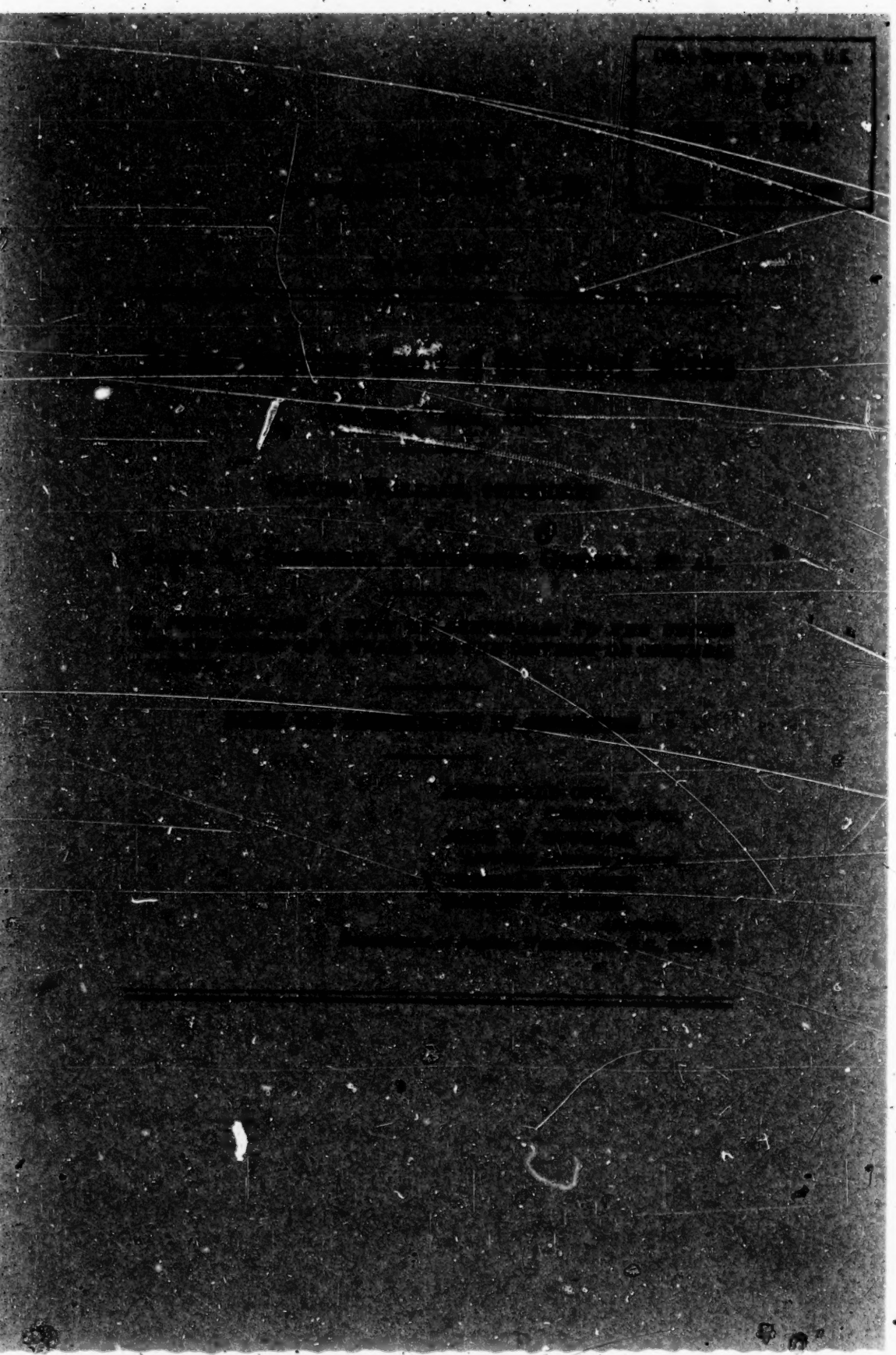

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1077

CLAUDE WALLACE, PETITIONER

v.

JOHN A. GRONOUSKI, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. 10) is not reported. The opinion of the court of appeals (Pet. 11-12) is reported at 328 F. 2d 565.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1964. The petition for a writ of certiorari was filed on May 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a postal distribution clerk, was discharged on the basis of an admitted incident in a public washroom, which included self-exposure by

petitioner in such a fashion as to be observed by one member of the general public and by two local police officers who immediately arrested him. The questions presented are:

1. Whether the administrative determination that petitioner's discharge was "for such cause as will promote the efficiency of the service," within the meaning of the Veterans' Preference Act, 5 U.S.C. 863, was arbitrary.

2. Whether petitioner's discharge was in accordance with applicable regulations.

3. Whether the dismissal of certain criminal charges against petitioner arising out of the incident barred the discharge.

STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended, 5 U.S.C. 863, and Section 744.12 of the Postal Manual are set forth in the Appendix, pp. 11–12, *infra*.

STATEMENT

In December 1960, petitioner, a veterans' preference eligible employed by the Post Office Department in Chicago, Illinois, as a distribution clerk, was notified pursuant to Section 14 of the Veterans' Preference Act (5 U.S.C. 863) that his removal from the postal service was proposed. Three charges were listed in support of this proposed action:[1]

(1) Petitioner was charged with conduct beneath the minimum standard required of postal employees

[1] The letter of charges is reproduced in full at pages 14–15 of the petition.

by Section 744.12 of the Postal Manual, in that, shortly after midnight on the morning of November 18, 1960, while occupying a toilet compartment in a bus station, in Memphis, Tennessee, he engaged in peeping at the male occupants of an adjoining compartment and exposed himself, through an opening in the separator between compartments, to one such occupant for a period of approximately two to three minutes. (2) Petitioner was charged with then having in his possession a concealed weapon, namely, metal knuckles, which was prohibited by local law. (3) Petitioner was also charged with having been arrested on that occasion for soliciting males, disorderly conduct, loitering and carrying a concealed weapon, and having been convicted of loitering and carrying a concealed weapon. The letter of charges referred to a five-page handwritten affidavit given by petitioner two weeks after the incident to a postal inspector, in which the events forming the basis for the charges were described in detail.

At a hearing held by the Civil Service Commission (J.A. 13–18)[2] pursuant to petitioner's request,[3] petitioner admitted that he had exposed himself in the

[2] "J.A." refers to the joint appendix in the court of appeals, which has been filed in this Court.

[3] Petitioner submitted a reply to the charges made in the initial letter, and the Postal Installations Manager, after considering the charges and the reply, determined that petitioner should be removed (J.A. 19). The official notification stated that the grounds for removal were "Conduct unbecoming a Postal employee" (J.A. 20). It was from this determination that petitioner appealed to the Civil Service Commission (J.A. 21–22).

washroom while he was on annual leave in Memphis, but stated that the time of self-exposure was a few seconds, rather than two to three minutes (J.A. 15, 16). Also before the hearing examiner was an arrest report by one of the police officers who arrested petitioner at the bus station (J.A. 5–7).[1] The postal inspector who had taken petitioner's affidavit also testified (J.A. 16–17).

Petitioner testified that he never had any motive of inviting a homosexual act and had never at any other time committed or invited the commission of a homosexual act (J.A. 11–12, 15). He also produced a character witness (J.A. 16). He explained that he carried metal knuckles for self-protection (J.A. 11, 15).

The hearing examiner found that all the facts alleged in the letter of charges were true and sustained the charges (J.A. 24–26). He indicated that he believed petitioner may have been carrying the metal knuckles for self-protection because it was not shown that petitioner had ever used such knuckles except for this purpose (J.A. 25–26). He also observed that the loitering offense did not involve the sort of conduct "for which a man, of itself, would be arrested" (J.A. 26). The examiner concluded that petitioner "may have had no ulterior motive but it can-

[1] On the morning after petitioner's arrest, the charges of disorderly conduct and soliciting males were dismissed. Petitioner was found guilty of loitering and carrying a concealed weapon. He was released after paying a fine (J.A. 7, 16). The local Post Office Inspector was notified by the police (J.A. 17), and the discharge proceeding was begun two weeks later.

not be denied that his actions were unbecoming a Postal employee, or for that matter any other person" (J.A. 26). Accordingly, he ruled that the Post Office was justified in concluding that petitioner's conduct was unbecoming that of a federal employee and in removing him so as to promote the efficiency of the service (J.A. 26). The examiner's ruling was sustained by the Board of Appeals and Review of the Civil Service Commission (J.A. 29–31).

Petitioner instituted this action to challenge the legality of his discharge.[1] The district court granted summary judgment for the government (Pet. 10), and the court of appeals affirmed *per curiam* (Pet. 11–12).

ARGUMENT

Petitioner does not maintain that the procedures followed by the Post Office Department and the Civil Service Commission were unconstitutional or were otherwise impermissible under the Veterans' Preference Act or any other statute or regulation. Nor does petitioner question the determination that he actually engaged in the conduct upon which his discharge was based. Instead, petitioner's principal contention relates to the merits of the administrative determination that his discharge was "for such cause as will promote the efficiency of the service" (Pet. 8, 9). But this determination was not arbitrary or capricious, and it was made for reasons which adequately appear in the administrative record. Accordingly, in light of the

[1] Jurisdiction of the district court was based on the Declaratory Judgment Act, 28 U.S.C. 2201, 2202.

limited scope of judicial review in this area, this case presents no issue appropriate for view by this Court.

1. The Veterans' Preference Act provides that preference eligibles may be discharged only "for such cause as will promote the efficiency of the service." This language appears to have been borrowed from the statute governing discharge of other classified civil servants, which contains a similar provision. 5 U.S.C. 652(a). Those words have never been construed so as to subject to searching judicial review an agency's considered decision, reached after a fair proceeding, that an employee's discharge is for such cause as will promote the efficiency of the agency's functions. A long line of decisions, beginning with this Court's holdings in *Keim* v. *United States*, 177 U.S. 290, and *Eberlein* v. *United States*, 257 U.S. 82, established the proposition that "employee removal and discipline are almost entirely matters of executive agency discretion, and * * * judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation." *Hargett* v. *Summerfield*, 243 F. 2d 29, 32 (C.A.D.C.), certiorari denied, 353 U.S. 970.[8] This limited scope

[8] See, *e.g.*, *Caplan* v. *Conally*, 299 F. 2d 126 (C.A. D.C.), certiorari denied, 373 U.S. 915; *De Fino* v. *McNamara*, 287 F. 2d 339 (C.A. D.C.); *Ellis* v. *Mueller*, 280 F. 2d 722 (C.A. D.C.), certiorari denied, 364 U.S. 883; *Green* v. *Baughman*, 243 F. 2d 610 (C.A. D.C.), certiorari denied, 355 U.S. 819; *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A. D.C.); *Powell* v. *Brannan*, 196 F. 2d 871 (C.A. D.C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832.

of review comports with the original purpose of the Civil Service Act, which was to prevent discharges on political grounds, and otherwise leave agencies free to develop their own personnel policies. Section 10 of the Administrative Procedure Act does not change this result, since it does not apply "so far as * * * agency action is by law committed to agency discretion." *Hargett* v. *Summerfield, supra,* and cases cited in note 6 *supra.*[7]

The discharge in this case was neither arbitrary nor an abuse of the broad discretion which the executive has in this area. The Post Office Department could reasonably conclude that this type of disgraceful personal conduct engaged in publicly by a postal employee in such a manner as to lead to arrest and conviction would tend to reflect unfavorably on the postal service, even if it were committed on the employee's vacation time. And the conclusion that unfavorable reflections on the postal service could "impair the efficiency of the service" hardly needs argument or explanation.

That the agency was concerned with the unfavorable reflection cast on the Post Office Department by petitioner's conduct appears clearly from the administrative record. First, the letter of charges, which

[7] The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Pelicone* v. *Hodges*, 320 F. 2d 754, is not to the contrary. The court was not concerned in *Pelicone* with whether the employee's discharge promoted the efficiency of the service. There the administrative determination had been made solely on the basis of the conclusion that the employee's conduct was criminal, and the court determined that this conclusion was legally erroneous.

instituted the discharge proceeding, cited Section 744.12 of the Postal Manual (p. 12, *infra*). That Section states that "[e]mployees are expected to conduct themselves * * * in a manner which will reflect favorably upon the postal service. * * * [T]he Post Office Department * * * does require that postal personnel be * * * of good character and reputation." Second, the official Notification of Personnel Action stated that petitioner was being removed for "Conduct unbecoming a Postal employee" (J.A. 20). Third, the hearing examiner's concern with possible unfavorable reflections on the postal service appears from his statement that "it cannot be denied that [petitioner's] actions were unbecoming a Postal employee, or for that matter any other person" (J.A. 26). Finally, the Post Office Department, in explaining the reasons for the discharge to the Board of Appeals and Review of the Civil Service Commission, stated that the quoted language of the hearing examiner "summarized" the case (J.A. 29), and that a consequence of petitioner's arrest was "all the accompanying reflection upon the postal service" (J.A. 28). In light of these statements, this case cannot be characterized as one in which the agency has justified its action solely on the basis of a verbal formula in the words of the statute (Pet. 9).

2. Petitioner suggests (Pet. 7–8) that this case is similar to *Dew* v. *Halaby*, No. 844, this Term, in which certiorari was granted, 376 U.S. 904. *Dew* v. *Halaby* is also a civil service discharge case in which the discharged employee, who was removed because of disgraceful personal conduct, is contending that

his removal cannot be said to promote the efficiency of the service. However, here the resemblance ends. In *Dew* the conduct took place four to six years before petitioner's federal employment began and six to eight years before the initiation of discharge proceedings. Moreover, there was uncontradicted evidence that Dew was no longer subject to the personality disorder evidenced by his past conduct. Finally, there was no suggestion in *Dew* that the private conduct in which the employee had engaged four to six years before he began his federal employment could reflect unfavorably on the employing agency. By contrast, this petitioner's disgraceful acts were committed while he was a federal employee and in a manner which occasioned some degree of notoriety. Since petitioner's conduct took place while he was a postal employee, and the Post Office Department initiated discharge proceedings after his acts had come to the attention of law-enforcement officials, there is no possibility in such a situation, as there was in *Dew* (see the dissenting opinion, 317 F. 2d at 590), that "historical research made on * * * pre-employment background" may be used to discharge a qualified but unpopular employee.

3. Petitioner's remaining contentions are without merit. Full faith and credit is not involved (Pet. 8). The discharge was not based on any determination that petitioner had violated laws regarding loitering and soliciting males—the charges against him which were dismissed. Moreover, petitioner has never denied the facts alleged in the letter of charges. Thus, the only question in the administrative proceeding was whether

a discharge premised on these facts would promote the efficiency of the service. This question was not involved at all in the Tennessee criminal court proceedings on which petitioner relies for his full-faith-and-credit contention.

Finally, whether or not Section 744.12 of the Postal Manual provides for dismissal in case of its violation is irrelevant (Pet. 8). There is no requirement that the discharge of a preference eligible be based on a regulation expressly providing for dismissal in the event of its violation; the only substantive requirement is that the discharge be for such cause as will promote the efficiency of the service. In any event, Section 745 of the Postal Manual does provide for dismissal for the type of violation of regulation involved here.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1964.

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* Section 745.12 defines "disciplinary action" as action imposed for, among other things, "willful or negligent violation of regulations or other lawful requirements," and Section 745.622 provides that removal is warranted, *inter alia*, for "immoral or notoriously disgraceful conduct."

APPENDIX

Statute and Regulations Involved

Section 14 of the Veterans' Preference Act, 78 Stat. 390, 5 U.S.C. 863, provides:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable

rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

Section 744.12 of the Postal Manual provides:

> Postal employees are servants of the general public and their conduct, in many instances, must be subject to more restrictions and to higher standards than may be for certain private employments. Employees are expected to conduct themselves during and outside of working hours in a manner which will reflect favorably upon the postal service. Although it is not the policy of the Post Office Department to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, and of good character and reputation.

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